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CHARLES ELMORE

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1932.

No. 496.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

vs.

ERNEST BROOKS, HAROLD WILSON BROOKS, and WALTER DOUGLAS BROOKS, as Executors of the Will of ERNEST AUGUSTUS BROOKS,
Respondents.

MOTION AND BRIEF OF AMICUS CURIAE.

EDWARD N. PERKINS,
Amicus Curiae.

IN THE

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Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

Now comes Edward N. Perkins, of 15 Broad Street, New York City, and moves this Honorable Court for leave to file the annexed brief as amicus curiae, the consent of counsel for the petitioners and of counsel for the respondent having been first obtained. The undersigned asks this leave as counsel for certain estates in process of administration, having large sums of tax-money at issue which will be materially affected by the outcome in the present cause.

EDWARD N. PERKINS,
Office and Post-office Address:
15 Broad Street,
New York, N. Y.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICUS CURIAE.

Statement by Counsel.

This brief is submitted on behalf of BEVERLEY R. ROBINSON, of New York City, as executor of the will of Marshall Owen Roberts, deceased, late of London, England, and on behalf of ARTHUR W. BUTLER, as executor of the will of Edith Lyman Collins, Marquise de Maleissye, deceased, late of Cap d'Ail, France.

Facts.

The facts relevant to the issue to be discussed in this brief are that the decedent died domiciled in Cuba leaving among other things bonds, being obligations of debtors

citizens of and domiciled in the United States of America, physically present within the United States, which the government of the United States has claimed the right to tax under section 303(b) of the Revenue Act of 1924 (43 Stat. 253).

The above-mentioned decedent Marshall Owen Roberts died domiciled in England a British subject leaving securities similarly situated as those in the case at bar. The above-mentioned Marquise de Maleissye died domiciled in and a citizen of France leaving securities similarly situated.

Summary of Argument.

I.

Due process of law does not admit of a state's taxing a transfer at death of which a territorial situs cannot be found within its jurisdiction. The due process clause of the Fourteenth Amendment forbids it. (*Frick* v. *Pennsylvania*, 268 U. S. 473; *Farmers Loan and Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *First National Bank of Boston* v. *Maine*, 284 U. S. 312.) The fact that in the cases cited two states were seeking to tax cannot be determinative. It cannot be unconstitutional for both states to tax unless for the reason that it is unconstitutional for one of the two to tax. The holding in each case cited is that it is unconstitutional for a state where situs cannot be found to tax.

II.

In the case of intangibles like bonds or shares the only situs is at the domicile of the decedent. This is held by the cases cited above.

III.

The transfer at the death of a non-resident of the United States of bonds of, or shares in, an American corporation, has an exclusive situs at the domicile. If it is true that there can be a situs in one state of the Union only, as held in the cases cited, it is necessarily true for the same reasons that there can be a situs in one country only.

IV.

If it is a violation of due process for a state to tax without situs, it is also so for the United States to, since the due process clause affecting the states under the Fourteenth Amendment, and that affecting the national government under the Fifth Amendment, are of identical significance and purport. (*Heiner* v. *Donnan,* 285 U. S. 312.)

ARGUMENT.

I.

It is now settled that due process of law does not admit of taxing a transfer at death unless the situs of the transfer is within the jurisdiction of the state laying the tax.

This, it is submitted, is the result of the holdings of this court in *Frick* v. *Pennsylvania* (268 U. S. 473), *Farmers Loan and Trust Co.* v. *Minnesota* (280 U. S. 204), and *First National Bank of Boston* v. *Maine* (284 U. S. 312).

The reason is, that it is held in each case (1) that one state only could tax and (2) that that one was the state of the situs. It was held, therefore, that a state where the situs was not, could not tax. And it was held a violation of due

process of law, under the Fourteenth Amendment, for the state where the situs was not, to tax.

The criticism directed to the evil of taxation of the same thing or event at the same time by two or more states, in the cases cited, is not (we submit) a determinative fact, because it was necessary, to reach the conclusion, to hold that a particular state could not tax. It could not be unconstitutional for two states to tax. It must be constitutional for both states to tax, *unless* it is unconstitutional for *one* of them to. In *Frick* v. *Pennsylvania* it was not unconstitutional for Pennsylvania *and* New York, or Massachusetts, to tax. It was unconstitutional for *one* of them, Pennsylvania, to tax. The reason is, as given, that situs could not be found in Pennsylvania. So, in the other cases, situs could not be found in Minnesota, or in Maine. The proposition decided in each case is, that it is unconstitutional for one particular state to tax. And in each case that one, as the opinions are careful to point out, is identified by the fact that situs cannot be found there. The necessary generalization is, that due process does not admit of taxation in respect of something of which the situs cannot be found within the jurisdiction of the taxing sovereign.

One of the basic propositions supporting the decision in *Frick* v. *Pennsylvania* is this (268 U. S. p. 489):

> "* * * while a state may so shape its tax laws as to reach every object which is under its jurisdiction it cannot give them any extra-territorial operation; * * *"

The following is quoted (along with the rest of the passage) on the same page, from *Union R. T. Co.* v. *Kentucky* (199 U. S. 194, at p. 204):

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. * * *."

That intangibles, such as rights of action on bonds (*Farmers Loan and Trust Co.* v. *Minnesota*) and corporate

shares (*First National Bank of Boston* v. *Maine*), as to the situs of their transfer at death, are limited to a single situs which must be within one jurisdiction or another, is proved by those two cases. In the latter case the court said (284 U. S. p. 326):

> "In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time."

The generalization that due process of law does not admit of taxation in respect of something of which the situs cannot be found within the jurisdiction of the taxing sovereign, therefore applies to transfers at death of intangibles like bonds or shares in a corporation, as well as to such transfers of tangible property.

II.

In the case of intangibles like bonds or shares, the exclusive situs for death transfer taxes is the owner's domicile.

This is clear on the authorities already cited. That there is always one exclusive situs is stated vividly in the opinion in *First National Bank of Boston* v. *Maine* thus (284 U. S. pp. 326, 327):

> "* * *. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there."

Each of the cases cited shows that the exclusive situs of intangibles like bonds or shares of stock, for the purpose of transferring them at death, is the owner's domicile. *Baldwin* v. *Missouri* (281 U. S. 586) is another member of this line. It shows also that mere physical presence in a locality other than the domicile of the evidences of right, such as stock certificates or bonds, is immaterial.

III.

In the case of proposed taxation by the United States of the transfer at death of bonds of, or shares in, an American corporation, owned by a non-resident alien decedent, the state of domicile, be it Cuba or any other foreign state, is the exclusive local situs for the purpose of the transfer.

The reason is, that as between states of the Union, this is settled by the authorities cited, and, if true as between states of the Union, it is also true as between national states. We submit that, in determining the *fact of situs*, there is no room or ground whatever to differentiate a case between Minnesota and New York from a case between Great Britain, or Cuba, and this country. A man dies domiciled in Cuba, or in Great Britain, owning bonds of American debtors lying in a vault in America. It is unquestioned that these have a situs for taxation in the country of domicile. If it is true, as between sovereign states of the Union, it is equally true, for the very same reasons, as between two national states, that "the trans-"mission from the dead to the living of a particular thing, "whether corporeal or incorporeal, is an event which can-"not take place in two or more states at one and the same "time", that "the opposite view must be rejected as con-"noting a physical impossibility", that "in the case of in-"tangible property, it must be rejected as involving an in-"herent and logical self-contradiction", and that "due

"regard for the processes of correct thinking compels the "conclusion that a determination fixing the local situs of a "thing for the purpose of transferring it in one state car- "ries with it an implicit denial that there is a local situs "in another state for the purpose of transferring the same "thing there". If it is true as between the states of the Union, so it is true as between national states that "a "transfer from the dead to the living of any specific prop- "erty is an event single in character and is effected under "the laws, and occurs within the limits, of a particular "state". (*First National Bank of Boston* v. *Maine*, 284 U. S. pp. 326 and 327.)

Accordingly we submit that these authorities settle it that bonds, and the transfer thereof at death, have their situs at the place of the decedent's domicile, which, in this case, is not in the United States; that they cannot have two situs; that therefore they have no situs at the place of the debtor's domicile.

IV.

It is equally unconstitutional for the United States, as for one of the states, to tax a transfer of which the situs cannot be found within its jurisdiction.

Our first proposition (page 3, *et seq., supra*), which we submit is established, is that the Fourteenth Amendment does not admit of taxation by a power within the jurisdiction of which situs cannot be found, for the reason that such action does not accord with due process of law. It is submitted that if "due process of law", according to the meaning of that expression in the Fourteenth Amendment, is incompatible with taxation by a state of the Union of that which has no situs in it, the same thing would necessarily be true as applied to taxation by the United States if the Fourteenth Amendment affected the conduct of the United States. If so, it follows that the "due process clause" of

the Fifth Amendment prohibits taxation by the United States in the present case, because the expressions "due process of law" in the Fourteenth and the Fifth Amendments are of identical significance. (*Heiner* v. *Donnan*, 285 U. S. 312.)

Respectfully submitted,

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